

**Religion, Culture, and Rights:
A Conversation about Women**

by

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The perception of civilizational conflict is nowhere more persistent than in debates over the roles, life choices, and rights of women. Why? Should states in the West accommodate the gendered practices and preferences of immigrant communities...?¹

Muslim women's bodies continue to be disciplined and regulated by both oppressive laws mandating veiling under authoritarian theocratic regimes in Iran, Saudi Arabia and Afghanistan as well as by the laws denying their freedom to wear head scarves in western democratic societies like France, Germany, and Turkey. In either case, the fact that their bodies are made subservient to the decrees of patriarchal state authorities is an anti-feminist move.²

I. Introduction

Canada today is a rights-based society. Although the Canadian Charter of Rights was adopted in 1982, rights have become part of the sticky stuff of Canadian identity. In a uniquely Canadian compromise, individual and collective rights have both been affirmed. Yet, Canada, like many societies, struggles to find the appropriate balance the two. Nowhere is this balance more contentious and elusive than is the intersection of religion, culture, and women's rights.

These three intersected recently in Canada when a debate broke out about the appropriateness of applying *shari'a* law in family disputes under private arbitration mechanisms. Private arbitration has long been a preferred dispute-resolution mechanism in Canada, as labour unions, commercial organizations, landlords and tenants, and many others chose to select their own consensual decision-maker, remove their issues from the general courts, and avoid the long delays. The government of Ontario recognized the role of private courts in a statute designed to facilitate private arbitration, the *Arbitration Act*, in 1990. Jewish arbitration tribunals (*Beit Din*), for example, were authorized to resolve disputes privately under that legislation. But when some Islamic jurists asked for the same status, their request prompted a heated public debate. Some sectors of the Muslim community and the Canadian feminist movement complained that allowing religious groups to apply their own family law would create parallel legal

¹ Issues set out for discussion in the Panel on "Women in Muslim Societies" by Stephen J. Toope, *Trudeau Foundation*, on 30 June 2006.

² Jasmine Zine (2006) "Between Orientalism and Fundamentalism: The Politics of Muslim Women's Feminist Engagement" *Muslim World Journal of Human Rights* v.3, n.1, article 5; <http://www.bepress.com/mwjhr/vol3/iss1/art5>.

systems that failed to protect the legal rights of religious women.³ The “No Religious Arbitration Coalition,” which included many Canadian feminist organizations and some Muslim organizations that identified themselves as moderate and/or secular/cultural Muslims, formed to lobby the provincial government to prohibit all religious-based arbitration in family law. After considerable hesitation, the government of Ontario banned religious courts under the Act.

The campaign and the decision provoked fierce controversy, problematizing religion, culture, and rights in private space, in public space, and in private space sanctioned by public law—the issue of religious law applied in private courts authorized by public law. This is not a new controversy. It evokes earlier times and different contexts. British colonial agents in the Anglo-Egyptian Sudan, for example, launched an aggressive campaign to improve the lives of Muslim women by reforming midwifery practice.⁴ The reform, designed to end the practice of female genital cutting, targeted “local superstition” through the training of existing and prospective midwives by British and British-trained instructors. The belief of many Muslim Sudanese that genital cutting was a religious requirement was treated by the British as an obstacle to be overcome through education. These educational programs were laced with images of Christian purity and normal human psychology, “all offered up as universal scientific truth.”

Yet, argues Janice Boddy, the concept of the self is never disconnected from the social, nor is it fixed. It is the model of liberal humanism, so important within the discourses of human rights, that imagines a stable self, existing prior to society or apart from it.⁵ It is precisely around this contradiction that contemporary debates about religion, culture, and the rights of women engage.

II. Religion in Society

There is a vigorous—and somewhat surprising—debate now ongoing about religion *in* society, rather than about religion and (or separate from) society. This debate is surprising to those schooled in the particularly liberal—and Christian—separation between public spaces, where a politically responsible life is openly lived, and the private, where one lives as one pleases according to cultural and religious beliefs and practices. This “great separation,” as Mark Lilla describes it, is historically contingent and contested.⁶ For centuries, first in the Jewish world, then in the Christian world, it was theology that provided the framework for politics. God provided the explanation for life, for death, for victory, for defeat, for

³ Constance Backhouse, “Muslim Women in Western Societies,” *Trudeau Foundation Annual Conference*, 16-18 Nov. 2006 Vancouver.

⁴ Janice Boddy, *Civilizing Women: British Crusades in Colonial Sudan*. Princeton: Princeton University Press. 2007.

⁵ Janice Boddy, “Who is the human in humanitarianism?” *Conference on Faith, Religion, and Humanitarianism*, Cairo, 23-25 May, 2008.

⁶ Mark Lilla, *The Stillborn God: Religion Politics and the Modern West*. New York: Knopf, 2007.

the cosmos, for the beginning and for the end. Theology, because it is all-encompassing, explains all, orders all, and provides meaning for what otherwise might be unintelligible and inexplicable.

It was only in the aftermath of the Wars of Religion—wars that lasted more than a hundred years and led to terrible bloodletting among Christians, and between Christians and Jews, and Christians and Muslims—that philosophers changed the question. An orderly political life could not be lived within the terms set by Christian political theology which bred violent eschatological passions and bitter sectarian differences. The question was no longer—what explains the world—but, rather—how can we have order? Philosophers began to ask how men could be relieved of their fear in a life that was “solitary, poor, nasty, brutish, and short?” How could believers in God become more secure in this world? Hobbes reversed the religious order, located the idea of God in the minds of men, and separated religion from politics.

His answer, of course, was an all-powerful state that would protect citizens and prevent violence. This answer fell on receptive ears; Europeans were exhausted by their religious wars. In the centuries that followed, western thinkers developed this core idea, divided the power of the state, strengthened the power of citizens, and, in the most consequential decision, with the acquiescence of the churches—separated the state from religion. Out of this fear of death through war grew the liberal-democratic order that separated the private from the public. This separation occurred at a particular moment in time, in a particular historical context.

Many philosophers and theologians did not accept either Hobbes’ radical materialism or his separation of “church” from state and worked to reconcile the search for meaning and transcendence with a liberal political order. Much of the nineteenth and the early twentieth century was consumed by that debate but the reconciliation failed and was ultimately consumed in the fires of messianic political movements. Only in the second half of the twentieth century was “God stillborn,” as Lilla argues and the separation confirmed. Yet for many, the separation is constructed as universal, a “modern” and “enlightened” model of the autonomous self that speaks not only to its inheritors, but is common to all humanity.

That this separation is culturally as well as historically contingent is again being debated, even in liberal-democratic societies. In the Jewish world—in Israel where synagogue and state met again in 1948 for the first time in two millennia—and in the Muslim world, the merits of this separation as well as its ontological standing are far from obvious. In Islamic societies, for example, the work of cultivating moral sensibilities rests only in part with the individual. Talad Asad, for example, argues:

...the body and-its-capacities...is subject to a variety of rights and duties held by others as fellow Muslims. There is [in Islam] a continuous, unresolved tension between responsibility as individual and metaphysical, on the one hand, and as collective and quotidian, on the other.⁷

It is not only the Jewish and Muslim worlds that reject this binary distinction between religious and secular. It is now being debated within the liberal-democratic order that grew out of the separation. Increasingly, the boundaries are being renegotiated so that they become fuzzy and porous.

Elizabeth Shenkman Hurd recently argued that the “modern, secular” order rests on a religious foundation.⁸ She argues that there are “two trajectories of secularism, or two strategies for managing the relationship between religion and politics.” The first is *laïcité*, which expels religion from politics. In France, leaders invoked *laïcité*, which has the status of official orthodoxy, when they banned *kippot*, *hijab* and crosses in public schools. The second trajectory, which Hurd terms Judeo-Christian secularism, accepts religion as part of cultural life and indeed is constitutive of modern secular life. Here, religion becomes the common ground for Western democracy and basic liberal institutions are shaped by Judeo-Christian values. “In this view,” argues Michael Barnett, “religion becomes either an element of Western secularism or makes Western secularism possible; in either case, the religious is part of the secular.”⁹

Charles Taylor finds religion in the age of secular in the search for the transcendental.¹⁰ The question he asks is whether individuals experience or seek “something beyond or transcendent to their lives.” Religion becomes a belief in the transcendent, in relationship to something that gives meaning to human life. Taylor argues that there is a complex, multilayered and co-constitutive relationship between the imminent and the transcendental in an age of secularism. Here we return to the mission of “enlightenment” that motivated the British colonial officers in Sudan:

The sense of superiority, originally religious in essence, can and does undergo a ‘secularization’, as the sense of civilizational authority becomes detached from Providence, and attributed to Race, or Enlightenment, or even some combination of the two. But the point of identifying here this sense of order is that it provides another niche, as it were, in which God can be present in our lives,

⁷ Talad Aad, “Reading a Modern Classic: The Meaning and End of Religion,” *History of Religions* 40, 3, 2001: 205-222, at p. 214.

⁸ Elizabeth Shenkman Hurd, *The Politics of Secularism in International Relations*. Princeton: Princeton University Press, 2007: 5-6.

⁹ Michael Barnett, “Faith, Religion, and Humanitarianism,” *Conference on Faith, Religion, and Humanitarianism*, Cairo, 23-25 May, 2008.

¹⁰ Charles Taylor, *A Secular Age*. Cambridge, Harvard University Press, 2007: 15-16.

or in our social imaginary; not just as the author of the Design which defines our political identity, but also of the Design which defines civilizational order.¹¹

The theological is present in the quotidian, Taylor argues, as one of many principles and perspectives people support for a host of different reasons. “[On] our [liberal] side of the river, ‘political theology’ has never been wholly absent, and has often been very prominent.”¹²

Hurd and Taylor provide two very important correctives. The first is that some forms of the secular have a religious dimension. The second is the extent to which liberalism also depends on faith. Modern liberalism, Taylor argues, is not merely about individualism, but also has a social dimension that is closely connected to the transcendental. If we accept these arguments, then the modern liberal order is not about the triumph of secularism, but rather the dominance of a particular form of secularism that itself has a strong religious content.¹³

It is in this construction of the modern liberal-democratic state as interconnected with religion that I locate the debate about religion, culture, and rights. Indeed, it is often impossible to separate religion and culture as the one constitutes the other.

Canada was created as a Christian country and special protections were provided to religious and linguistic communities in the British North America Act, some of which continue to this day. Religion and language were interwoven to create distinct cultural communities long before the “rights revolution” swept through Canada in the modern period. It is in this sense that rights sit uneasily with embedded religions and cultures.

III. Women in the Eye of the Storm

It is little surprise that as the rights revolution deepened in Canada, women’s rights came to the forefront of the discussion in the broader discussion of human rights. When rights in a liberal-democratic state bump up against deeply embedded religious-cultural traditions, the hot spot of contention is the rights of women.

¹¹ Charles Taylor, *A Secular Age*. Cambridge, Harvard University Press, 2007: 456.

¹² Charles Taylor, “Two Books, Yoked Together,” http://www.ssrc.org/blogs/immanent_frame/2008/01/24/two-books-oddly-yoked-together/.

¹³ Michael Barnett, “Faith, Religion, and Humanitarianism,” *Conference on Faith, Religion, and Humanitarianism*, Cairo, 23-25 May, 2008; Nicholas Guilhot, “Secularism, Realism, and International Relations,” <http://www.ssrc.org/blogs/immanent-frame/2007/10/31/secularism-realism-and-international-relations/>; Elizabeth Sherkman Hurd, “The Other Shore,” http://www.ssrc.org/blogs/immanent_frame/2007/12/18/the-other-shore/.

This is not surprising, given that the three great monotheistic religions—Judaism, Christianity, and Islam—all have foundational texts which are profoundly patriarchal. Whether one reads these texts literally, as revealed truth, or contextually, as the product of a social context in historical time, all three contain texts which profoundly discriminate against women. Although there is much debate and controversy on this point, for the purposes of this paper, I take this argument as a “taken-for-granted” axiom.

It is not only the tensions between religion as embedded tradition and a deepening understanding of rights that is fuelling the controversy. Tension is exacerbated by a global resurgence of religious orthodoxy. Coming after several centuries of enlightenment, science, a culture of progress, and the embedding of liberalism in the west, the flourishing of religion is surprising to those who live in post-industrial societies. It is also an important statement on the unfulfilled promise of the enlightenment and of “secular” societies. Religious orthodoxy is growing in the south, in rich countries like the United States, and it travels easily with some diasporic communities that bridge societies and cultures. It is happening in Christianity, in Islam, in Judaism, and in Hinduism, where lines of division between “them” and “us” are being drawn more sharply than they were half a century ago.

III. Women in Public Space

Some of the controversies that have erupted in the last few years touch directly on women in public space, but focus—at least on the surface—on issues that should be non-controversial in societies that are rights-based. The most obvious is the continuing public discussion in western societies about what women wear in public. Jack Straw, when he was Foreign Secretary in the United Kingdom, complained about the *niqab*, the full-face veil that some Muslim women wear. He argued that the *niqab* creates a sense of distance and separation between the veiled women and her interlocutor.¹⁴ A teacher in a public school, for example, should not be permitted to wear a full-face veil, he argued, because it separated her from her students. In France, the government, which subscribes to an orthodox doctrine of *laïcité*, forbade students in public schools to wear *hijab*, crosses, or *kippot*.

In Canada, this is a conversation that we have not had, at least until very recently. Canadians have treated what a woman wears as a “private” decision, even when women appear in public spaces. It would be inconceivable for Canada to enforce restrictions against *kippot*, crosses, or veils in public schools.

The Bouchard-Taylor Commission, which was asked to explore “reasonable accommodation” after a small village in Québec banned the stoning of women, did recommend that judges, police officers, and Crown prosecutors be banned

¹⁴ Alan Cowell, British Leader Splits Nation with his Call to Raise Veils,” *New York Times*, October 7, 2006, A6.

from wearing religious symbols and that municipal councils abandon prayers at public meetings.¹⁵ The Commission also recommended that the crucifix be removed from the legislature to reassure religious minorities of the secularity of the legislature. The premier immediately rejected that recommendation, claiming that the large crucifix and attachment to Catholicism is part of Québec's heritage. "We can't erase our history," Premier Charest insisted.

The Commission defined the secular in public space very narrowly. Prohibitions on religious symbols are restricted to security and judicial institutions only. The rest, the Commission argued—teachers, public servants, and health professionals—should be free to wear whatever symbols of religious identity they choose. Moreover, the Commission strongly supported public funding of faith-based schools, a proposition that Ontario voters roundly rejected in the last provincial election.

The debate about religious identification—and more particularly on how women dress as a marker of religious identity—covers a deeper issue, one that runs just beneath the surface. Almost all the world's great religions insist that women must be covered, that they must dress modestly, and that they must behave with appropriate modesty.

It is difficult, in any of the foundational texts of the three great monotheistic religions, to find specific injunctions which require women to cover themselves extensively. Most of the restrictions have evolved over time, as commentary and law through the centuries. The covering of women began not as religious observance, but as a sign of class difference. Upper class women were able to wear the long flowing robes that their less fortunate female counterparts could not. Evolutionary psychologists have also provided compelling explanations as to why men would want women, especially their partners, covered in public. The covering of women restricted conflict and violence among men who did not have to defend their women from the lustful gaze of male competitors.

Some women from all religious traditions tell me that they cover up because they fear their male relatives—their fathers or their uncles or their brothers—and therefore it is easier to acquiesce. Others tell me that they fear strange men and feel safe from predators when they are covered. Still others, again from all religious traditions, tell me that they cover up as a mark of identity, as a symbol of authenticity, as a sign of religious observance, and out of respect for their own community, and that their decision is made freely within a tradition that they voluntarily honour. When they choose to do so voluntarily, there is no conflict between equality rights and the right to freedom of religion. When women choose to cover themselves out of fear, however, their rights are violated.

How we "know" whether women are coerced or are making a voluntary choice is often not obvious. Yet we accept arguments about authenticity within our broader

¹⁵ Rhéal Séguin, "Quebec's Day of Reckoning," *The Globe and Mail*, May 23, 2008, A1.

traditions of liberalism and rights and rarely engage the deeper argument about the systematic differences in the treatment of men and women. We rarely speak in public about the coincidence that it is women who are covered, not men, irrespective of religious tradition. Nor do we talk about the belief, common to all religions, that it is women who are responsible for inciting lust or violence in men.

IV. Women in “Private” Space

More directly relevant are women’s rights in marriage and divorce. In Canada, civil marriage and divorce are legal. The issue of women’s rights became the focus of public debate when the question of the voluntary acceptance of religious courts for private arbitration arose in Ontario. While private arbitration deals mainly with private contracts in business, it can also cover settlements between husband and wife who are separating or divorcing. It was the potential application of *shari’a* law that provoked the controversy.

Jewish religious courts had operated in Ontario since 1990, without careful monitoring of their impact on the rights of women. When the controversy over Islamic law erupted, the debate broadened to include the risk to women’s rights of all religious courts. The government ultimately refused to authorize the operation of Islamic courts under private arbitration and simultaneously withdrew its sanction of orthodox Jewish legal courts. The government decided that it would not recognize any religious legal practices in publicly sanctioned arbitration. The decision was welcomed by those who worried about the impact of religious law on equality rights.

The tension between equality rights and the right to freedom of religion was not resolved, but only redirected. Religious courts will, of course, continue to operate in private, on a voluntary basis, without official sanction. Yet private use of these courts may not be wholly voluntary; some women may have very little recourse but to go to these courts, given the authority structure within their religious communities. Turning a blind eye to private use of law courts on a voluntary basis is the only option in a society like Canada that separates private religious practice from public authority. Nevertheless, many women are systematically disadvantaged in private courts that use religious law interpreted through structures of authority within their communities.

A quite different case—one that brought religious practice into public courts—received a great deal of attention from legal and constitutional scholars. A Jewish woman signed a prenuptial agreement with her husband—a private contract—in which he undertook to grant her a religious divorce (a *get*) should they divorce in the future. Without the *get*, she could not remarry nor have children under Jewish law. The husband’s refusal—when they did divorce, he withheld consent for fifteen years—created a “chained wife” (*agunah*).

The wife sought damages from the husband, alleging breach of contract. The debate centred around the justiciability of contracts with religious obligations and whether the husband could invoke the right to freedom of religion (under the Québec Charter of Human Rights and Freedoms) to avoid the legal consequences of failing to comply with the agreement that he had signed. The trial judge awarded damages in the amount of \$500,000 but the Québec Court of Appeal reversed the decision and found for the husband. The Court of Appeal held that the substance of the obligation (to grant the *get*) was religious in nature and therefore unenforceable by the courts. The judgment was appealed to the Supreme Court of Canada.

The fundamental issue facing the Court was the boundaries of the right to the freedom of religion. Was the husband entitled to immunity from damages for his breach of contract because his obligation was religious? Can a civil court enforcing a contract interfere with the interpretation of religious law?

The Supreme Court ruled in favour of the wife. Madame Justice Abella, writing for the majority, held that this was a civil case with a religious component. She argued that the case was fundamentally about the enforcement of a divorce agreement, a civil obligation that falls under the purview of private contract law. In finding for the wife, Abella argued that the Court was compensating the wife for losses stemming from the husband's breach of contract. It was not forcing the husband to grant his wife the *get*, that is, to take any religious step that he did not want to take.¹⁶

In its reasoning, the Court argued that the fact that the dispute has a religious dimension does not by itself make it non-justiciable. Recognizing the enforceability by civil courts of agreements to discourage religious barriers to remarriage addresses the gender discrimination these barriers may represent and alleviates the effects they may have on extracting unfair concessions in a civil divorce. This harmonizes with Canada's approach to equality rights, to divorce and remarriage generally, to religious freedom, and is consistent with the approach taken by other democracies. Any impairment to the husband's religious freedom is significantly outweighed by the harm both to the wife personally and to the public's interest in protecting fundamental values such as equality rights and autonomous choice in marriage and divorce. These, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests that outweigh the husband's claim.

The decision is a landmark decision. Through the prism of a private contract, it engages the conflict between the right to religious freedom and equality rights. It opens a discussion which will be ongoing. The Court did not order the husband to grant the *get*. Presumably, it would have construed such an order as a violation of the right to freedom of religion under the Charter of Rights. The woman is still, under Jewish religious law, unable to remarry. Some may also

¹⁶ Bruker vs. Marcovitz, at <http://scc.lexum.umontreal.ca/en/2007/2007scc54/2007scc54.html>

question whether ordering the husband to pay substantial damages for violating a private contract can be construed as interference with his religious rights. Nevertheless, the precedent has now been established that religious freedom must be weighed against the harm done through specific religious practices and “to the public’s interest in protecting fundamental values such as equality rights and autonomous choice in marriage and divorce.”

V. Equality Rights and Freedom of Religion

The sanctity of public space is undisputed in most of the world. “... [H]istorically speaking,” Mark Lilla argues, “political theology is the primordial form of political thought and remains a live alternative for many peoples today. When looking to explain the conditions of political life and political judgment, the unconstrained mind seems compelled to travel up and out: up toward those things that transcend human existence, and outward to encompass the whole of that existence.”¹⁷

Only with a great deal of effort and in a small part of the world, have people separated the basic questions of politics from theology. The temptation to break through the barriers of the Great Separation is strong and constant throughout history. In our time, the conflict between the right to freedom of religion and equality rights is real, and the answers are often not obvious.

In Canada, rights that are now “taken-for-granted” are protected through the Charter of Rights and the Criminal Code. Any physical violence against women is illegal, no matter the reason. Genital cutting, for example, is illegal in Canada. Pharonic circumcision may be regarded by some as a religious responsibility, “a collective act intended to cultivate moral dispositions and proper social orientations in the young.”¹⁸ Nevertheless, even though it can be construed as a religious and community obligation, we make it illegal as a fundamental violation of the rights of women.

In the ongoing conversation about religion and rights, it is worthwhile asking how we define the moral order, how we flatten distinctions so that on basic rights, all are equally worthy.¹⁹ That is the foundation of a rights culture and, I would argue, what unites rather than divides all religious traditions. Underlying this ongoing conversation is our conception of what it means to be fully human and how we transcend the immanent to give meaning to the fully human life.

¹⁷ Lilla, *op. cit.*, pp.306-307.

¹⁸ Janice Boddy, “Who is the human in humanitarianism?” *Conference on Faith, Religion, and Humanitarianism*, Cairo, 23-25 May 2008.

¹⁹ Saba Mahmoud, *Politics of Piety*. Princeton: Princeton University Press. 2006.